Supreme Court, U.S.

NO. 981184 JAN 20 1999

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

EARL E. HOSEY, JR.,
Petitioner

V.

LINDA M. HOSEY,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECISION OF THE MISSISSIPPI SUPREME COURT UPHOLDING MONETARY JUDGMENTS AND JUDGMENTS FOR CIVIL AND CRIMINAL CONTEMPT WHICH WERE ENTERED WITHOUT PERSONAL SERVICE AND/OR NOTICE ON MR. HOSEY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AS REQUIRED BY PREVIOUS DECISIONS OF THIS COURT.

LIST OF THE PARTIES TO THE PROCEEDINGS BELOW

1. Earl E. Hosey, Jr., Appellant
2. Linda M. Hosey, Appellee

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On August 13, 1998, the Mississippi Supreme Court denied Earl E. Hosey, Jr.'s appeal of the 1997 judgments of the Chancery Court of Lauderdale County which adjudged him to be in contempt for non-payment of past due child support, separate maintenance and alimony and dismissing his Answer, Motion to Dismiss and counter-claims. A copy of the unpublished opinion of the Mississippi Supreme Court is attached as Appendix 1. *Hosey v. Hosey*, SCt. #97-CA-0339-SCT consolidated with #97-CA-567-SCT, 1998 Miss. LEXIS 386. Rehearing was denied on October 22, 1998. A copy of that order is attached as Appendix 2. The judgment of the Chancery Court of Lauderdale County dated 1-17-97, is attached as Appendix 3. The Chancery Court's order dated 4-3-97, denying rehearing is attached as Appendix 4. A copy of the judgment dated 2-12-97 dismissing the counter-claim is attached as Appendix 5. A written copy of the judgment memorializing the Court's March 3rd order is and dated 3-7-97 is attached as Appendix 4. A copy of the judgment dated 4-18-97 sustaining Linda's contempt motion is attached as Exhibit 6.

JURISDICTION

The judgment of the Mississippi Supreme Court was entered on August 13, 1998. Rehearing was denied on October 22, 1998. This Court has jurisdiction under Title 28 *U.S.C.*, §1257(a) which provides that final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution,

treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. *U.S. Const. Amend. XIV (in pertinent part):*

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 11-7-301, Miss. Code Ann.:

> In this act "foreign judgment" means any judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

3. 28 U.S.C. §1738 (in pertinent part):

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

4. *Miss. Rule Civ.P.*, Rule 4 (in pertinent part):

(4) By Publication.

(A) If the defendant in any proceeding in a chancery court, or in any proceeding in any other court where process by publication is authorized, by statute, be shown by sworn complaint or sworn petition, or by a filed affidavit, to be a nonresident of this state or not to be found therein on diligent inquiry and the post office address of such defendant be stated in the complaint, petition, or affidavit, or if it be stated in such sworn complaint or petition that the post office address of the defendant is not known to the plaintiff or petitioner after diligent inquiry, or if the affidavit be made by another for the plaintiff or petitioner, that such post office address is unknown to the affiant after diligent inquiry and

he believes it is unknown to the plaintiff or petitioner after diligent inquiry by the plaintiff or petitioner, the clerk, upon filing the complaint or petition, account or other commencement of a proceeding, shall promptly prepare and publish a summons to the defendant to appear and defend the suit. The summons shall be substantially in the form set forth in Form 1-C.

(B) The publication of said summons shall be made once in each week during three successive weeks in a public newspaper of the county in which the complaint or petition, account, cause or other proceeding is pending if there be such a newspaper, and where there is no newspaper in the county the notice shall be posted at the courthouse door of the county and published as above provided in a public newspaper in an adjoining county or at the seat of government of the state. Upon completion of publication, proof of the prescribed publication shall be filed in the papers in the cause. The defendant shall have thirty (30) days from the date of first publication in which to appear and defend. Where the post office address of a defendant is given, the street address, if any, shall also be stated unless the complaint, petition, or affidavit above mentioned, aver that after diligent search and inquiry said street address cannot be ascertained.

STATEMENT OF THE CASE

(a) Course of the Proceedings Below:

This case is the culmination of protracted litigation between the parties. The immediate proceedings began with a 1996 Motion filed in the Lauderdale County, Mississippi, Chancery Court by Linda Hosey to hold Earl Hosey in contempt for failure to comply with previous orders of the Court awarding her money judgments arising out of Earl's alleged failure to pay child support, separate maintenance and alimony. A judgment was entered on January 17, 1997, dismissing Earl Hosey's Motion to Dismiss and Affirmative Defenses to Linda's contempt motion. A copy of that judgment may be found in Appendix 3.

On February 12, 1997, the Court entered an order dismissing his counter-claim to Linda Hosey's motion that he be held in contempt. A copy of that order may be found at Appendix 5. Earl then filed a Motion for New or Amended Findings on the January judgment. The Court issued a bench opinion on March 3, 1997 [Appendix 4], and subsequently entered a written judgment on March 7, 1997, dismissing Earl's counter-claim [Appendix 4], and Earl appealed to the Mississippi Supreme Court.

Subsequently, on April 18, 1997, the Court granted Linda's contempt motion. [Appendix 6]. Earl also appealed this ruling. Earl's appeals were consolidated, and were denied by the Mississippi Supreme Court on August 13, 1998. Appendix 1. Rehearing was denied on October 22, 1998. Appendix 2.

Mr. Hosey's request that this Court grant certiorari arises out of the failure of the Mississippi Courts to observe procedural and substantive due process.

(b) Statement of Facts:

In order to understand the issues, it is necessary to understand the course of the lengthy litigation between

Linda and Earl Hosey. On January 23, 1984, a judgment granting child custody and support and separate maintenance to Linda Hosey was granted in the Chancery Court of Lauderdale County, Mississippi. In that judgment, Earl was ordered to pay $600.00 a month as separate maintenance beginning January 1984 [referred to hereafter as the separate maintenance judgment]. He was also ordered to pay $350.00 per month per child for each of the two minor children as child support beginning January of 1984. Linda was awarded the marital domicile in Lauderdale County, an automobile, and house contents. Earl was also ordered to pay the monthly house payment and payment on the automobile, $1,500.00 in attorney's fees, and all debts of his and Linda's as of October 21, 1983. Earl's total monthly payments exceeded $2,000.00. His adjusted gross income for 1984 was $21,115.25, and for 1985 was $28,547.18.

Subsequently, as a result of his employment, Earl moved and while in the Dominican Republic, in April of 1984, he commenced divorce proceedings against Linda. Linda was served with notice of the proceedings, but failed to appear. Earl was granted a divorce on or about May 7, 1984 [referred to hereafter as Earl's divorce].

Later in 1984, in a separate lawsuit and case, Linda filed another suit in Lauderdale County Chancery Court for Partition/Partition Sale of the former marital domicile in Meridian, Mississippi. Process on Earl was by publication. Subsequently, a judgment was entered on November 14, 1984, appointing a Special Commissioner, waiving appraisal and awarding Linda a money judgment of $19,986.04 for arrearages as of September 19, 1984, under the earlier Separate Maintenance Judgment. A lien was also impressed against Earl's half interest in the marital domicile.

On December 11, 1984, the Commissioner sold the property to Linda for $30,000.00.

In 1986, Linda filed a Motion to hold Earl in contempt for failure to pay the amounts awarded in the previous separate maintenance judgment. Earl was not served with process. Process was mistakenly served on a Robert W. Courtney, instead of Earl. The contempt motion was heard on March 10, 1986, without notice to Earl and without his knowledge. He was found in *criminal* contempt for not complying with the separate maintenance judgment and ordered to serve 30 days in jail. He was also found in civil contempt and ordered incarcerated. Monetary judgment in the sum of approximately $59,000.00 was entered against him for unpaid child support and separate maintenance, interest, *etc.* [hereinafter referred to as the 1986 judgment].

Earl's adjusted gross income in 1986 was $26,684.00, and in 1987, was $14,566.00.

Linda continued to live in Meridian, but in 1984, the Hosey's daughter moved out, and Linda no longer provided any support for her. Earl, however, did pay support to the daughter. In March of 1989, the Hosey's son, Steven, moved out of Linda's house and stayed with friends for a few months when he then went to live with Earl and was supported by Earl until well into majority.

In that same month, March of 1989, Linda filed for divorce in Lauderdale County seeking additional arrearages from Earl. Earl employed an attorney, but in December of 1992, the attorney filed a Motion to Withdraw. He did not, however, give notice to Earl. Subsequently, the trial court heard the motion but delayed consideration until "after proper notice is given by the Attorney for the Defendant to the Defendant as required by law and the rules of the Chancery Court." Despite the fact that no notice was ever given to Earl by the attorney, the trial court granted his

request to withdraw and held the hearing on the divorce on the same day. Earl was not present; nor was he represented at the hearing.

Linda was granted a divorce in 1993 [hereinafter referred to as Linda's divorce], and Earl was ordered to pay $600.00 a month in alimony. He was again held in criminal and civil contempt for arrearages totaling $55,296.16 alleged to be owing from the 1986 contempt judgment. Linda was granted interest on that judgment of $39,471.76 and court costs for a total of $94,767.92. She was also awarded additional sums of $143,264.78 for alleged arrearages under the 1984 separate maintenance judgment, plus interest of $102,265.88 for a total judgment of $340,298.58, and attorney's fees and litigation expenses of $2,897.12. Moreover, Earl was again ordered to be incarcerated.

Later, in 1996, Earl was jailed pursuant to the judgments incorporated into Linda's divorce decree, and Linda filed a motion entitled "Motion on Review for Specific Relief"—an action which was in the nature of a motion to hold Earl in contempt for failure to comply with the 1993 divorce decree. Earl then filed a Motion to Dismiss Linda's motion and an Answer and Affirmative Defenses. He also filed a counter-claim for relief from the Court's previous judgments under Rule 60(b)(6) and in addition alleged that Linda had secured the previous judgments through fraud on the court and without due process of law.[1]

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[1] In that pleading, Earl first alleged the due process/notice problem. Specifically, he alleged that Linda's 1993 divorce was "void for failure of ... notice of the withdrawal of his Attorney . . . and ... notice of the scheduled trial setting." *See,* Answer and Counter-claim, p.4-5. He likewise alleged that the March 14, 1986 judgment was "void [for lack of] notice." *Id.*, p. 6. Similarly he alleged that the judgment of November 14, 1984 was "void

Earl's Motion to Dismiss and his Affirmative Defenses were tried first were dismissed by the chancery court by judgment dated January 17, 1997. *See*, Appendix 3. On February 12, 1997, that court entered an order dismissing his counter-claim to Linda Hosey's motion that he be held in contempt. Appendix 5. Earl then filed a Motion for New or Amended Findings on the January judgment. The Court issued a bench opinion on March 3, 1997 [Appendix 4], and subsequently entered a written judgment on March 7, 1997 [Appendix 4], dismissing Earl's counter-claim. Earl appealed to the Mississippi Supreme Court.

Subsequently, on April 18, 1997, the Court granted Linda's contempt motion. Appendix 6. Earl also appealed this ruling. Earl's appeals were consolidated, and were denied by the Mississippi Supreme Court on August 13, 1998. Rehearing was denied on October 22, 1998.

REASONS FOR GRANTING THE WRIT

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for no personal process." *Id.* Subsequently, he argued in the trial court that the previous courts had lacked jurisdiction because of the notice/due process violations. He likewise raised the issue numerous times in his briefs to the Mississippi Supreme Court. *See, e.g.*, his citation to federal cases on the due process/notice issue as a constitutional violation: *e.g., Harry's v. Hardeman*, 55 U.S. 334 (1852). Appellant's Brief, p. 29, 31, Rebuttal Brief of Appellant, p. 8. He also raised the constitutional question in his Petition for Rehearing to the Mississippi Supreme Court. *E.g.*, p. 25 ["failure of the Court to [vacate chancery court's decision] will violate Earl's rights of Equal Protection of Law and of Due Process of Law as guaranteed by the Constitutions of Mississippi and the United States . . . .]"

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECISION OF THE MISSISSIPPI SUPREME COURT UPHOLDING MONETARY JUDGMENTS AND JUDGMENTS FOR CIVIL AND CRIMINAL CONTEMPT WHICH WERE ENTERED WITHOUT PERSONAL SERVICE AND/OR NOTICE ON MR. HOSEY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AS REQUIRED BY PREVIOUS DECISIONS OF THIS COURT.

In January of 1984, the Lauderdale County Chancery Court entered a judgment in favor of Linda ordering Earl to pay separate maintenance and child support for their two minor children. The total payments exceeded Earl's adjusted gross income for that year.

Thereafter, because of his work, Earl moved and in the Dominican Republic where he instituted divorce proceedings against Linda. Linda received notice of these proceedings, but failed to appear and defend. Consequently, in May of 1984, the Courts of the Dominican Republic granted Earl severed the marriage of the parties "with all its legal consequences" and awarded custody of the children to Linda.[2]

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[2] Under Mississippi law, the Dominican Republic divorce would be entitled to full faith and credit. §11-7-301, *Miss Code Ann.* [This section, known as the Uniform Enforcement of Foreign Judgments Act, includes judgements, decrees or orders of courts of the United States or "any other court"]. Full faith and credit due to judicial proceedings, within the meaning of art 4, §1 of the Federal Constitution is "the same full faith and credit as they have by law or usage: in the courts of the state from which they are taken. 28 USC §1738. The Dominican Republic divorce was

Later in 1984, Linda moved for partition of the marital residence and was granted her request. She was also given a money judgment against Earl for arrearages allegedly arising out of the 1984 separate maintenance judgment even though she knew Earl had secured a divorce. In Mississippi, "separate maintenance" payments terminate on divorce. *Kennedy v. Kennedy*, 650 So.2d 1352 (Miss. 1995) [separate maintenance is an equitable remedy based upon the existence of a marital relationship].

Process for this judgment was executed fraudulently on Earl by publication because Linda knew his whereabouts and failed to have him personally served as required by Mississippi law.[3] For example, the Mississippi Supreme Court has held that service of notice by publication on out-of state husband, with copy of summons mailed to his supposed out-of-state address, was insufficient to warrant trial court's exercise of personal jurisdiction over him in divorce case. Miss. Rules Civ.Proc., Rule 4(c)(4); *Hamm v. Hall*, 693 So.2d 906 (Miss. 1997); *see also*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)..

In 1986, Linda secured an additional money judgment and criminal contempt order against Earl for child support and separate maintenance arrearages pursuant to the 1984 separate maintenance judgment even though she knew that Earl had divorced her in 1984. Moreover, their daughter no longer resided with her or received any

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certified by the American Consul as being entitled to "full faith and credit."

[3] The residence and a post office address of a non-resident must be given or it must be shown that the same cannot be learned after diligent inquiry before publication for a non-resident is valid. *Ponder v. Martin*, 119 Miss 156, 80 So. 388 (1918); *Burns v Burns*, 133 Miss 485, 97 So. 814 (1923).

support from her. Instead, Earl paid the support money directly to the child.

In the 1986 case, process was personally served, but not on Earl. Instead, it was served erroneously on another person who executed an affidavit to that effect. In Mississippi, it is well-established that either party may attack the truthfulness of the process involved. *Petersen v. Petersen*, 648 So.2d 54, 57 (Miss. 1995).

In 1989, the Hosey's son, Steven, went to live with his father who supported him directly well into his majority. Notwithstanding her divorce and her failure to provide support for either of the minor children, Linda in 1989 filed for divorce and sought additional arrearages in child support and separate maintenance from the 1984 judgment.

In this case, Earl was personally served with process and filed an answer through his attorney. However, on the day that the case was scheduled, the attorney requested that he be allowed to withdraw. Since the record did not reflect that Earl had ever been served with the attorney's motion to withdraw or notice of the hearing date and since he was not present in court, the Court continued the attorney's motion with instructions to the attorney to notify Earl pursuant to the rules of court which require that Earl be served with written notice.

Earl, however, was never served with notice of any kind of the rescheduled hearing or his attorney's request to withdraw. Nevertheless, on the next scheduled date, the attorney was allowed to withdraw, and the case proceeded to trial without Earl or his attorney and with no notice to Earl of the hearing. Subsequently, Linda was granted a divorce, and Earl was ordered to pay $600.00 per month in alimony. In addition, a money judgment for the arrearages from the 1984 separate maintenance and child support judgment was entered against him, and he was adjudged in

civil and criminal contempt for the failure to pay those arrearages and ordered incarcerated.

In 1996, Earl was arrested pursuant to the contempt judgment entered at the time of Linda's divorce. Again, Linda moved for additional contempt charges and a judgment for arrearages from the 1984 separate maintenance judgment which had been incorporated into her 1993 divorce decree and for Earl's failure to pay her the alimony awarded in that decree.

Earl defended that motion on the grounds that the 1984 separate maintenance agreement terminated with his 1984 divorce and that he, therefore, did not owe Linda for separate maintenance after that decree. He further claimed that he should be allowed a set-off for any sums of child support which he had paid in kind or directly to the minor children, sums which he claimed would more than have satisfied any child support he owed.[4] Furthermore, he claimed that the 1986 money judgment for arrearages should be set aside for the additional reason that he had not received actual notice.

He also claimed that Linda's 1993 money judgment for alimony and past due separate maintenance and child support were void for the additional reason that, although he had received notice of the pending suit, he had received no notice of the hearing or of the intent of his attorney to withdraw leaving him unrepresented. He also defended on the ground that the statute of limitations had run on any

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[4] In fact, Linda admitted that Steven "had already received his money through his father. . . . He's already got what he should have received . . . ." (Tr. 56). Linda's position was that Earl should pay her as well. (Tr. 57). Under Mississippi law, Earl was entitled to "full credit for all support paid to the child" or "for the benefit of the child" and for payments "after the son moved in with him." *Varner v. Varner*, 588 So.2d 428, 434-45 (Miss. 1991).

claims for child support as to the daughter. In addition, he alleged that Linda had been paid some of the monies that she was alleging were unpaid.

The lower court, however, refused to consider Hosey's claims that the judgments were void for lack of jurisdiction (notice) or that he was entitled to an offset for payments directly to or for the benefit of the child although under Mississippi law, lack of notice and hence lack of jurisdiction may be collaterally attacked at any time, and under Mississippi law, Earl was entitled to an offset for such payments. See, Appendix 5; Varner *v. Varner*, *supra*.

The lower court, without record support, also held that Mr. Hosey had been notified of his attorney's intent to withdraw in Linda's divorce case. Appendix 5. The Court also refused to credit Mr. Hosey with payments directly to the children because he had failed to present this question in Linda's divorce case at the hearing, the hearing which he had no notice of. *Id.*

The Mississippi Supreme Court upheld the lower court's rulings. In so doing, the Supreme Court has sanctioned the most egregious denials of due process of law. There is no principal of constitutional law more engrained in American jurisprudence than the right of its citizens to have notice and an opportunity to defend suits filed against them.

This principal has been a constitutional rule in this country at least since *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed.2d 565 (1878). *See, also*, *Estin v. Estin*, 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed.2d 1561 (1948) [judgment for support is a "personal judgment" requiring actual personal service of process].

Moreover, this Court has repeatedly held that before monetary judgments may issue, its citizens are entitled to actual notice and an opportunity to defend. *E.g.*,

Pennoyer v. Neff, *supra*; *Estin v. Estin*, *supra*, *Kulko v. Superior Court*, 436 U.S. 84, 91-92 (1978). In most of Linda's proceedings against Earl, he was denied notice and a meaningful opportunity to defend.

The only notice of the 1984 monetary judgment was by publication. This Court has repeatedly held that such publication does not constitute actual notice which will support a monetary judgment. *See*, citations in preceeding paragraph.

The 1986 contempt judgment which incorporated the 1984 judgment was similarly obtained without actual notice to Earl. In that case, process was erroneously served on someone else. The Mississippi Courts denied Earl an opportunity to challenge the jurisdiction of this judgment based on his claim of lack of actual notice. Again, the due process clause requires that actual notice to support the judgment. *Id.*

Moreover, it should be noted that Earl was not without defenses against this action because he did not owe separate maintenance after 1984 because Earl divorced Linda in May of 1984. Moreover, he was entitled to offsets on the child support because he directly supported his children. *Varner v. Varner*, *supra*.

Earl similarly lacked constitutionally sufficient notice of Linda's divorce proceedings. His attorney was allowed to withdraw without notice to him of that intent or of the actual hearing date. This lack of actual notice defeats the court's monetary judgment. *E.g.*, *Pennoyer v. Neff*, *supra*. Not insignificantly, that judgment again incorporated sums allegedly owed from the 1984 and 1986 judgments. It bears repeating that Earl had been given no opportunity to defend against the 1986 judgment, either.

Similarly, in the 1996 contempt proceedings and subsequent appeal, Earl was denied the opportunity to raise the notice issues. In short, Earl has been subjected to

incarceration and to having to pay vast sums of money without ever being given a meaningful opportunity to defend. On occasions too numerous to recount, this Court has condemned such actions by the courts. In *Griffin v. Griffin*, 327 U.S. 220, 228, 66 S.Ct. 556, 569, 90 L.Ed.2d 635 (1946), this Court that a money judgment issued for past due alimony entered against a civil litigant without actual notice and without any form of service of process calculated to give him notice was void for

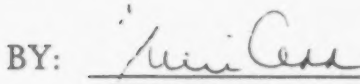
> want of judicial due process, and hence want of that jurisdiction over the person of petitioner prerequisite to the rendition of a judgment in personam against him [citations omitted].

The same is true here. The judgments of the Mississippi courts clearly violates this Court's holding in *Griffin v. Griffin*, *supra*, among other cases of this Court, because they decreed money judgments for past due alimony, child support and separate maintenance without notice and a meaningful opportunity for Earl to defend.

CONCLUSION

This Court should grant certiorari to ensure that the Mississippi Supreme Court respects the holdings of this Court requiring notice and an opportunity to defend.

Respectfully submitted,
Earl E. Hosey, Jr., Petitioner

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EARL E. HOSEY, JR.

Appendix 1

OPINION OF THE MISSISSIPPI SUPREME COURT

EARL E. HOSEY, JR. v. LINDA M. HOSEY

NO. 97-CA-00339-SCT CONSOLIDATED WITH 97-CA-00567-SCT

SUPREME COURT OF MISSISSIPPI

1998 Miss. LEXIS 386

August 13, 1998, Decided

NOTICE:[*1]NOTDESIGNATED FOR PUBLICATION.

PRIOR HISTORY: COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CHANCERY COURT. DATE OF JUDGMENT: 3/4/97. TRIAL JUDGE: HON. SARAH P. SPRINGER.

DISPOSITION: AFFIRMED.

COUNSEL: ATTORNEY FOR APPELLANT: DANNYE L. HUNTER.

ATTORNEYS FOR APPELLEE: DANIEL P. SELF, JR., JOSEPH A. KIERONSKI, JR.

JUDGES: PRATHER, CHIEF JUSTICE, SULLIVAN AND PITTMAN, P.JJ., BANKS, ROBERTS, SMITH, MILLS AND WALLER, JJ., CONCUR. McRAE, J., CONCURS IN RESULT ONLY.

OPINIONBY: PRATHER

Appendix 1
OPINION OF THE MISSISSIPPI SUPREME COURT

OPINION: NATURE OF THE CASE: CIVIL - DOMESTIC RELATIONS

BEFORE PRATHER, C.J., BANKS AND SMITH, JJ.

PRATHER, CHIEF JUSTICE, FOR THE COURT:

This domestic relations case arises from protracted litigation between the parties, which began when the appellant's 1983 petition for divorce was denied and the appellee was granted separate maintenance and child support. In 1986, the appellant was ruled in contempt of court for failing to comply with the 1983 judgment. In 1989, the appellee filed for divorce. In 1992, the appellant, through his attorney, filed an answer, but refused to obey the court's order and provide his address or appear in court (presumably for fear of being arrested for his contempt of the previous decrees).

The chancellor [*2] granted the appellee a divorce on the grounds of desertion in 1993. The appellant was ordered, among other things, to pay alimony. The divorce decree also incorporated the previous contempt judgment, and adjudicated the appellant's total arrearage since the 1983 separate maintenance decree.

The appellant was subsequently arrested by the federal authorities for failure to pay child support. Shortly thereafter, in 1996, the appellee moved for specific relief (primarily in the form of payment on the previous judgments, and court supervision of such payments). The appellant's motion to dismiss and counter-motions were denied, and the appellee's motion for specific relief was granted. The appeals of these two judgments were consolidated.

On appeal, the appellant primarily attacks the validity of the prior judgments against him. He also raises issues that were adjudicated in those proceedings. The issues raised by the appellant are without merit. Therefore the judgments of the chancellor are affirmed.

I. STATEMENT OF THE CASE

Linda M. Hosey (hereinafter Linda) and Earl E. Hosey, Jr. (hereinafter Earl) were married in 1966. They had two children: Kimberly, born February 26, 1967, [*3] and, Steven, born May 8, 1971. They separated May 12, 1983, and Earl filed for divorce on the grounds of habitual cruel and inhuman treatment. Linda filed a cross-complaint for separate maintenance.

On January 18, 1984, the Lauderdale County Chancery Court dismissed Earl's complaint for divorce and granted Linda's cross-complaint for separate maintenance. The chancellor awarded Linda $600 per month separate maintenance; custody of the children; and, $700 per month child support. Earl was also ordered to maintain a health insurance policy on the children and to pay 75% of the children's medical expenses not covered by the policy. Linda was granted the exclusive use of the marital home. Earl was ordered to pay the mortgage, insurance, taxes, and property association fees. Earl was also ordered to pay 75% of the maintenance and upkeep on the home, court costs, and Linda's attorney fees.

On November 14, 1984, the chancellor granted default judgment against Earl on Linda's complaint for partition and distribution of the marital home, and ordered the sale of the home. The chancellor also found Earl to be $19,986.04 in arrears on the original separate maintenance

judgment, and granted [*4] Linda a lien on $19,986.04 of Earl's share of the proceeds from the sale.

On March 14, 1986, upon Linda's motion, the chancellor found Earl guilty of civil and criminal contempt for failure to comply with the separate maintenance decree. The chancellor specifically found that Earl had "been lawfully served with process", but had failed to appear at the hearing on the contempt matter. The trial judge ordered that Earl be jailed for thirty days on the criminal contempt charge and that he be jailed on the civil contempt charge until he paid $55,385 arrearage.

On March 1, 1989, Linda filed for divorce. The trial was held February 22, 1993. Although Earl did not appear, the chancellor specifically found that Earl was personally served with process August 14, 1992. In addition, Earl answered the complaint October 19, 1992, but failed to provide his address to the Court or his attorney as previously ordered. The chancellor allowed Earl's attorney to withdraw, "said attorney having testified on the record as to his reasons therefore as well as testifying further that he gave sufficient and proper notice to the defendant of the date, time and place of this trial and of his intent to withdraw [*5] . . . ".

The chancellor found that Earl had deserted Linda, and granted her a divorce and $600 per month alimony. The judgment of divorce also "preserved, renewed and incorporated" the previous judgments against Earl. The chancellor found Earl in civil and criminal contempt of court and ordered that Earl be jailed. The judgment itemized Earl's indebtedness to Linda, which totalled $340,298.58. In addition, Earl was assessed with $2,500 of Linda's attorney fees plus court costs.

Earl was later arrested by the federal authorities for failure to pay child support. Shortly thereafter, on August

1, 1996, Linda moved for specific relief, in the form of payment on the previous judgments, and court supervision of such payments.

Earl answered and asserted the following affirmative defenses: a) that the previous judgments in Linda's favor were void; b) that Linda was not entitled to child support arrearage, because the children were emancipated, and any arrearage would be the separate property of the children; c) that he had "over-paid" child support by sending and/or giving it to the children, instead of Linda; and d) that he was entitled to "numerous credits" on the alleged arrearage. [*6] In addition, Earl alleged that the statute of limitations had run on Linda's claim for unpaid child support for Kimberly.

Earl also moved to dismiss or continue Linda's motion for specific relief, and claimed that the children were "necessary parties to any case involving litigation of any alleged arrearage(s) of child support". In addition, Earl filed a counter-motion requesting an accounting and attacking the previous judgments against him under M.R.C.P. 60 (b) (4-6). Earl contended, among other things, that: a) the 1993 divorce decree was void because Earl did not receive notice of his attorney's withdrawal or of the scheduled trial setting and because Linda committed fraud upon the court; b) the 1986 contempt judgment (subsequently incorporated in the 1993 divorce judgment) was void because Earl was not served with process and because Linda committed fraud on the court; c) the previous judgments of his criminal contempt were "erroneous statements of the law"; d) he had almost "if not entirely" supported Kimberly Hosey since "the end of 1984", and that he had "supported entirely" Steven Hosey since March, 1989; e) he had provided medical insurance for the children at all times; [*7] f) he had "over-paid" his

child support obligations; and g) a "true and accurate accounting" would reflect that his total alimony/separate maintenance arrearage was much less than that alleged by Linda.

A hearing was held January 16, 1997. On January 17, 1997, the chancellor denied Earl's motion to dismiss and counter-motions, and held that the motions were without merit. On February 25, 1997, Earl moved for new or amended findings and conclusions. After a March 3-4, 1997, hearing, the chancellor denied the motion. Earl appealed.

On April 16, 1997, a hearing was held on Linda's motion for specific relief. Earl admitted that he had not paid Linda any money since 1983. On April 18, 1997, the chancellor issued an order incorporating all previous judgments in this case and granting Linda's motion. Specifically, the chancellor found that a) Earl owed $467,290.71 in unpaid alimony and $50,384.51 in unpaid child support, with 8% interest per annum accruing from the date of judgment; b) Earl's gross monthly income as an engineer in the oil industry was $6,230 and his net monthly income was $4,715; and, c) Earl would be unlikely to pay his total indebtedness to Linda in his lifetime. [*8]

The chancellor ordered a) Earl to pay $900 per month child support arrearage and $600 per month alimony; b) Earl's incarceration for contempt to be suspended, provided that Earl comply with "each and every requirement" of the judgment; c) Earl to name Linda as primary beneficiary on $300,000 of the life insurance maintained through his employer, until such time as his indebtedness to Linda is reduced to below $300,000, at which time, the insurance requirement would be reduced to the remaining unpaid balance; d) Earl to pay any future bond refund on his federal case to Linda on the alimony

arrearage; e) a lien against Earl's estate in favor of Linda; f) Earl to sign over any future income tax returns (with the provision that, should Earl's new wife become employed, a hearing would be held to determine the portion of the refund attributable and payable to her); g) Earl to send his tax returns to Linda each year, and file a certificate of compliance with the court; h) Linda to be enjoined from using Earl's tax information for any purpose other than monitoring Earl's compliance with the judgment or enforcing and collecting on the judgment; i) Earl to provide an annual income and [*9] expense statement to Linda; and j) Earl to appear periodically in person before the court "to review his continued compliance with the requirements of this judgment and to review whether Earl's incarceration in the Lauderdale County Jail should continue to be suspended."

The chancellor also set aside a conveyance from Earl to his new wife, which was made around the time that Earl was apprehended by the authorities. The chancellor ruled that the conveyance "was made in anticipation of Linda's actions to collect his unpaid alimony and child support, and the transaction was done in an attempt to defeat her efforts at collection."

With regard to Earl's 401(k) account of $42,599.04, the chancellor found that Earl had contributed 1% of his income to this account "during the time that Earl was disregarding the orders of this court and failing to pay child support and alimony as required by this court. It is inequitable for him to have the benefit of the assets he accumulated while Linda was doing without the support she was due." The chancellor ordered Earl to withdraw the "net amount available" and pay it to Linda on the alimony judgment. The chancellor made a similar ruling with regard

[*10] to Earl's $7,503.50 pension plan with a previous employer.

Linda did not seek attorney fees on her motion for specific relief. However, she did request attorney fees for the defense of Earl's motion to dismiss and counter-motions. The chancellor granted Linda attorney fees in the amount of $6,088.95, with interest at the rate of 8% per annum. Earl was also assessed with all court costs.

Earl's appeal from the award of specific relief was consolidated with his earlier appeal from the denial of his motion to dismiss and counter-motions. Earl's consolidated appeals raise the following issues for consideration by this Court:

A. Whether the trial court committed reversible error in overruling Appellant's motion to dismiss any claim for child support for Kimberly Hosey based upon the statute of limitations?

B. Whether the trial court committed reversible error in not requiring the adult children to be made parties?

C. Whether the trial court committed reversible error in dismissing Steven Hosey with prejudice?

D. Whether the trial court committed reversible error in not requiring an accounting of arrearage and payments?

E. Whether the trial court committed reversible [*11] error in not setting aside the November 14, 1984 money judgment?

F. Whether the trial court committed reversible error in not setting aside the March 14, 1986 money and contempt judgment?

G. Whether the trial court committed reversible error in not setting aside the February 22, 1993 divorce judgment?

H. Whether the trial court should vacate the award of attorney fees to the appellee?

I. Whether the trial court committed reversible error in not admitting into evidence Appellant's proffered testimony?

J. Whether the terms and conditions imposed by the trial court upon the Appellant for release from incarceration are unreasonable and should be vacated?

K. Whether setting aside a deed from the Appellant to his wife was improper and should be reversed and vacated?

L. Whether the conviction of criminal contempt should be vacated?

II. LEGAL ANALYSIS

"Our review of a chancellor's findings is well settled. This Court's scope of review in domestic relations matters is limited." *Spalding v. Spalding, 691 So. 2d 435, 437-38 (Miss. 1997).* "In cases involving alimony and child support, we afford the chancellor considerable discretion and [*12] his findings will not be reversed unless he was manifestly in error or abused his discretion." *Tanner v. Roland, 598 So. 2d 783, 786 (Miss. 1992).*

This Court finds that the chancellor did not abuse her discretion in granting Linda's motion for specific relief or in denying Earl's motion to dismiss and counter-motions. Accordingly, the judgments are affirmed. See generally *Varner v. Varner , 588 So. 2d 428, 433 (Miss. 1991)* ("either the child or the former custodial parent may bring an action against the defaulting parent"); Miss. Code Ann. § 15-1-43 (1995) (claims for back child support may be brought within seven years of the child's emancipation -- and in this case, Linda received judgments for back child support prior to either child's emancipation); *Vice v. Department of Human Services, 702 So. 2d 397, 400 (Miss. 1997)* (this Court has "quite clearly affirmed" the right of the custodial parent to assert emancipated children's

interest in past-due child support); *Tanner, 598 So. 2d at 786* ("in family law, as in other areas of our jurisprudence, we recognize that that which has been finally adjudicated should not be relitigated") [*13] (citing *Tedford v. Dempsey, 437 So. 2d 410, 417 (Miss. 1983)); Carter v. Clegg, 557 So. 2d 1187, 1190 (Miss. 1990)* ("the granting of motions for dismissals is subject to the sound discretion of the trial court" and, ordinarily, a "trial court should grant a voluntary dismissal unless some legal prejudice occurs"; opponents of the motion to dismiss a party have the burden of proving prejudice); *Sorrell v. Borner, 593 So. 2d 986, 987 (Miss. 1991)* (the children are the only parties who may compel an accounting of child support sums from the parent who receives them); *Campbell v. Campbell, 357 So. 2d 129, 132 (Miss.1978)* (chancery court retains continuing personal jurisdiction of the parties in domestic relations cases, such that modifications of child support or child custody can be made by publication when the party to be served has moved out of the State); M. R. C. P. 60 (b) (4-6) (motions attacking prior judgments must be brought within a "reasonable" time); *Owen v. Gerity, 422 So. 2d 284, 288-89 (Miss. 1982);* M.R.E. 103(a) ("error may not be predicated upon a ruling which admits or excludes evidence unless a substantial [*14] right of the party is affected . . ."); Miss. Code Ann. § 15-3-3 (1995) (chancellors may set aside fraudulent conveyances that defeat creditors); *Morreale v. Morreale, 646 So. 2d 1264, 1268 (Miss. 1994)* (ex-wives may be considered creditors under Miss. Code Ann. § 15-3-3); Purvis *v. Purvis, 657 So. 2d 794, 797 (Miss. 1994)* (criminal contempt penalties are designed to punish for past offenses, such as disobedience or disrespect of the court).

III. CONCLUSION

The issues raised by the appellant's consolidated appeals are without merit. Therefore, the judgments of the trial court are affirmed.

JUDGMENT IS AFFIRMED.

SULLIVAN AND PITTMAN, P.JJ., BANKS, ROBERTS, SMITH, MILLS AND WALLER, JJ., CONCUR. McRAE, J., CONCURS IN RESULT ONLY.

Appendix 2

ORDER DENYING REHEARING

EARL E. HOSEY, JR. v. LINDA M. HOSEY

NO. 97-CA-00339-SCT CONSOLIDATED WITH 97-CA-00567-SCT

SUPREME COURT OF MISSISSIPPI

October 22, 1998, Decided

MOTION FOR REHEARIN DENIED.

IN THE CHANCERY COURT OF LAUDERDALE COUNTY

THE STATE OF MISSISSIPPI

LINDA M. HOSEY — PLAINTIFF/ COUNTER DEFENDANT

VS. — CIVIL ACTION No. 89-0242-S

EARL E. HOSEY, JR. — DEFENDANT/ COUNTER/PLAINTIFF

(Heard before the Honorable Sarah P. Springer on Thursday, January 16, 1997)

Opinion and Judgment

THE COURT: This civil action came for hearing on the answer and counter motion filed by Earl E. Hosey, Jr. This answer and counter motion contains a motion to dismiss, answer, affirmative defenses, and counter motion, along with a motion for accounting. Also considered by the Court is the amendment to motion to dismiss and affirmative defenses filed by Earl E. Hosey, Jr. Linda M. Hosey filed an answer to counter motion, motion to dismiss, affirmative defenses, and the amendment thereto filed by Earl E. Hosey, Jr. and

requested that the counter claim filed by the defendant counter/movant be dismissed.

At the commencement of the hearing, the parties entered stipulations which were accepted by the Court. The parties stipulated that Kimberly Hosey was born February 26, 1967. She would have turned 21 on February 26, 1988, and the statute of limitations on her claim for child support would have expired on February 26, 1995. The parties further stipulated that Stephen Hosey was born May 8, 1971, and he would have turned 21 on May 8, 1992, and the statute of limitations on his claim for child support would not run until May 8, 1999.

Earl Hosey, Jr. presented numerous exhibits to the Court which have been considered in the rendering of this opinion. These exhibits are as follows: Exhibit 1, the deposition of Stephen Hosey. Exhibit 4, the opinion of the Court rendered in civil action no. F-2140 and entered on January 18, 1984 which granted separate maintenance to Linda Hosey and among other relief set monthly separate maintenance payments at $600.00 per month and child support at $350.00 per month per child. Exhibit 5 is the judgment conforming with that opinion, which was entered January 18, 1984, nunc pro tunc. Exhibit 6 is the partition judgment which ordered the partition sale of the former marital home which was entered on November 14, 1984. Exhibit 7, the judgment conforming partition sale which was entered on 12/21/84. Exhibit 8, is the opinion of the Court and entered on March 10, 1986, which was a contempt judgment judgment, and credit was given to Mr. Hosey for the sums realized in the partition action by Mrs. Hosey. Exhibit 9, is the judgment conforming with the contempt opinion which was entered on March 14, 1984. Exhibit 10, is the motion to withdraw filed by attorney Joe Clay Hamilton, dated 12/18/92 and filed

12/21/92 in civil action no. 89-242-W. Exhibit 11, is the judgment on the pending motions entered January 13, 1993 which required notice to Mr. Hosey of the withdrawal of his counsel. Exhibit 12, is the order allowing the withdrawal of the attorney entered February 22, 1993. Exhibit 13, is the judgment of divorce which was entered on. the 24th day of February, 1993. The divorce was granted to Mrs. Hosey and the previous judgments for child support and separate maintenance were incorporated into this judgment.

The first matter raised by Mr. Hosey is that the Plaintiff's motion on review for specific relief be dismissed because part of the movant's claim involveschild support for the party's two children, Kimberly and Stephen, who are both competent emancipated adults, and are necessary parties to any case involving arrearage and child support. The Court has accepted the initial stipulations with regard to the children's ages and the situation with respect to the statute of limitations. The Court also notes that there is a motion to intervene filed by Stephen Hosey which will be heard at a future date. At the time that the final judgment of divorce was entered, Kimberly Hosey was an adult, and the child support judgment for back child support which was updated through that judgment was for vested past due child support and therefore the motion to dismiss for failure to include Kimberly Hosey as a party in this action is without merit. The Court will address whether or not Stephen Hosey needs to included as a party when it hears the motion to intervene which is still pending in this civil action.

Through his testimony, Mr. Hosey attempted to show to the Court that none of the previous judgments were valid, however most of his testimony was on proffer due to sustained objections that the judgments themselves

indicate that the Court had jurisdiction of the subject matter and parties and all of the judgments are several years old, the most recent one being exhibit 13, the judgment of divorce which was granted on February 24, 1993. On cross-examination, Mr. Hosey admitted that he made no challenge to the validity of the judgments until such time as he was arrested due to the contempt incarceration provisions of the previous orders and brought before the Chancery Court of-Lauderdale County. Mr. Hosey's contention that these judgments are void for lack of jurisdiction are without merit. Each one of the judgments does reflect that the Court considered the jurisdictional issue, and each judgment found that the Court did have jurisdiction of the parties and the subject matter to be adjudicated. Mr. Hosey is making a collateral attack against judgments that have been of record for many years. His complaints about notice and the withdrawal of his attorney are all matters that are of record in the civil actions from which the judgments came. For him to be allowed to attack those findings at this late date is impermissible.

Mr. Hosey cites the case of Myers v. Mississippi State Bar 480 So2d 1080 (Missl985) about the procedure required to allow the withdrawal of an attorney. Mr. Hosey's attorney was allowed leave to withdrawal and exhibit 13 contains the following language " ... and the attorney for the defendant having moved the Court for permission to withdrawal of counsel for the defendant and the said attorney having testified on the record as to his reasons therefore as well as testifying further that he gave sufficient and proper notice to the defendant of the date, time and place of this trial and of his intent to withdraw and the Court having found that based upon his testimony said attorney for the defendant should be permitted to

withdraw and that notice of the date, time and place of the trial was given to the defendant timely by said attorney . . . ." The original motion to withdraw filed by Mr. Hamilton was not granted initially due to the fact that Mr. Hosey had not been given notice. Subsequently, the Court had a hearing at which time the attorney, an officer of the court, testified as to the actual notice given to Mr. Hosey. For Mr. Hosey to attack this finding
at this late date cannot be allowed.

Mr. Hosey also cites the case of Johnson v. Weston Lumber and Building Supply Co., 566 So2d 466 (Missl990) which is a case on Mississippi Rules of Civil Procedure rule 600(b)6. Rule 60 provides that a litigant may receive relief from judgment "on motion and upon such terms as are just" and several reasons are listed. Mr. Hosey alleges that the judgments are void due to lack of notice to him, however all of the judgments indicate that that issue was taken up by the Court and a specific finding was made that the Court did have jurisdiction of the matter.

Part of the allegations made in Mr. Hosey's motion include allegations of fraud on the part of Mrs. Hosey. Rule 60 is specific in that when such a claim is made, the motion shall be made within a reasonable time and specifically in the case of an allegation of fraud that the motion be made not more than six months after the judgment order or proceeding was entered or taken. Obviously, we are more than six months post-judgment.

With regard to the motion for accounting, when this case is heard in its entirety, the Court will make a determination as to the total amount that is owed by Mr. Hosey to Mrs. Hosey (and/or Stephen Hosey) after all the evidence is heard.

With respect to the amendment to the motion to dismiss and affirmative defenses, the amount of child

support owed by Earl E. Hosey, Jr. for the benefit of Kimberly Hosey was reduced to judgment in the judgment of divorce. Kimberly Hosey had already reached her 21st birthday when the judgment of divorce was entered, and it is obvious from the specific amount set in that judgment (that is an amount due for support of Stephen and an amount due for the support of Kimberly) that the Chancellor took into consideration the emancipation of Kimberly Hosey in awarding the judgment amounts to Mrs. Hosey in the judgment of divorce.

Therefore, the request to dismiss contained in the amendment to the motion to dismiss is also found to be without merit and is therefore dismissed.

None of the issues raised in the Defendant's counter motion are found to have merit, and they should be and are hereby dismissed.

SO ORDERED AND ADJUDGED, this the 17th day of January, 1997.

S/ Sarah P. Springer
CHANCELLOR

IN THE CHANCERY COURT OF LAUDERDALE COUNTY
THE STATE OF MISSISSIPPI

LINDA M. HOSEY PLAINTIFF/
COUNTER DEFENDANT

VS. CIVIL ACTION No. 89-0242-S

EARL E. HOSEY, JR.
DEFENDANT/
COUNTER/PLAINTIFF

(Heard before the Honorable Sarah P. Springer on Tuesday, March 4th, 1997)

OPINION AND JUDGMENT

THE COURT: The motion that the Court has heard over the last day and a half has been a motion to reconsider the ruling made by this Court on January 16th, 1997. The motion does invoke rule 60 of the Mississippi Rules of Civil Procedure, specifically rule 60(b)l.

Rule 60(b)l deals with correction of judgments due to inadvertence or newly discovered evidence, fraud, et cetera. The rule reads as follows: "On motion and upon such terms as are just the Court may relieve a party or his legal representative from a final judgment order or proceedings for the following reasons: (1) Fraud, misrepresentation or other misconduct of an adverse party." There are other grounds stated under 60(b) and then the rule goes on to state that "the motion shall be made within a reasonable time and for reasons 1, 2 and 3, not more

than six months after the judgment, order or proceeding was entered or taken."

The rule goes on to state that "this rule does not limit the power of the Court to entertain an
independent action to relieve the party from a judgment order or proceeding or to set aside a judgment for fraud upon the Court."

Although the rule specifically states that fraud should be brought to the Court's attention within six months of the entry of the judgment the argument before the Court is that there was no notice previously to allow the defendant to bring these matters before the Court and equity demands that this Court consider setting aside these judgments due to fraud committed on the Court.

The evidence that is before the Court on this motion has mainly been through proffers of exhibits and proffers of testimony.

Mr. Hosey has testified through his own testimony and by presentation of his father's testimony that he did support his children through payments that he should have been given credit or, that he purchased them cars, he gave them money through his father and gave them money directly.

The previous judgments of this Court have required that Mr. Hosey pay the support directly to Mrs. Hosey, so even if he had been allowed at the previous hearings to present this type of testimony to receive credit, it is likely that he would not have received credit, because he did not follow the terms of the original orders, which did require payments to Mrs. Hosey.

The complaints made by Mr. Hosey about lack of notice and the like cover a period from 1983 through 1993, when the divorce judgment was entered. With respect to the divorce, Mr. Hosey was before this Court represented by counsel and filed an answer to the divorce, which was admitted into evidence as Exhibit 84. This answer was filed on October 19, 1992. In December, 1992, the attorney

for Mr. Hosey, Joe Clay Hamilton, filed a motion to withdraw from further representation of Mr. Hosey. A judgment on pending motions as entered by this Court on January 13, 1993, which set the case for hearing at 1:00 o'clock, p.m. on February 22, 1993.

The judgment passed the motion for leave to withdraw and stated that the motion could be called up again after proper notice is given by the attorney for the defendant to the defendant as required by law, and the rules of the Chancery Court.

The Court evidently made a finding at that point that Mr. Hosey had not been notified of his attorney's desire to withdraw and the motion was passed to allow Mr. Joe Clay Hamilton the opportunity to notify Mr. Hosey of his intentions and also the trial date.

The next order that is entered in this Court file was entered on February 22, 1993, at 1:17 p.m., which is shortly after the time set in the January 13th motion, that order does allow Joe Clay Hamilton leave to withdraw.

Obviously, the Court took note of the importance of notice to Mr. Hosey and directed Mr. Joe Clay Hamilton to notify Mr. Hosey, not only of his intent to withdraw, but also of the trial day and this order was entered after that time.

The Judgment of Divorce was entered on February 24, 1993, and also addresses the issues of the withdrawal of Mr. Hosey's attorney. The judgment specifically states that "the defendant having failed to appear in person, but having appeared by and through his attorney of record, Joe Clay Hamilton, and the Court having determined and found that this Court has full and complete jurisdiction over the parties hereto, by virtue of personal service of process on the defendant in the manner and form required by law, as well as his entry of appearance in and before

this Court and the filing of pleadings by the Defendant and his attorney and the attorney for the Defendant having moved the Court for permission to withdraw as counsel for Defendant, and the said attorney having testified on the record as to his reasons therefore, as well as testifying further that he gave sufficient and proper notice to the Defendant of the date, time and place of this trial and of his intent to withdraw, and the Court having found that based upon this testimony, said attorney for the Defendant should be permitted to withdraw and that notice of the date, time and place of the trial was given to the Defendant timely by said attorney and the Court having heard the testimony of the Plaintiff and her witnesses," and then the Court goes on to adjudicate the relief granted through that judgment.

There has already been an evidentiary hearing held on February 22, 1993 about the efforts made by Mr. Joe Clay Hamilton and the Court specifically found in its judgment on February 24, 1993, that Earl Hosey had actual notice of not only the withdrawal of his counsel but also the setting of the divorce trial for that time and date.

Based on those adjudications this Court must find that Mr. Hosey was properly in Court at that time, was properly represented by counsel, and he was properly informed and notified of what had occurred previously throughout the conduct of this civil action or civil actions between Earl Hosey and his former wife, Linda Hosey.

Assuming that Mr. Hosey had absolutely no notice of any of the previous judgments, that is the separate maintenance and the contempt, and all the prior actions of the Lauderdale County Chancery Court, which the Court does not find to be true, but assuming that that would be true, he certainly should have brought all those matters before the Court when he was here personally and through

his attorney in the conduct of the divorce trial. And for him to come at this late date years after the entry of the divorce and say that he had no notice, and that there was fraud committed against the Court is frankly way too late.

The answer to complaint for divorce also raises the issues raised through the proffers that he, Mr. Hosey, should have been given credit for various payments and he did have the opportunity to raise those issues before the divorce was granted and did not take advantage of those opportunities and this Court, today, should not reinstate that opportunity, because he had his chance and this Court is a Court of equity and the Court will not allow Mr. Hosey to go forward with those matters at this time because they have already been dealt with through previous orders and he should be estopped from attacking these previous orders at this time.

This Court already in its opinion and judgment of January 16, 1997, found Mr. Hosey's claims and assertions to be without merit and the Court has again considered the same issues over the past day and a half, and again finds that those assertions are without merit and therefore the motion for new or amended findings and conclusions is overruled and the Court will now proceed with the motion of the Plaintiff, Mrs. Hosey.

***

SO ORDERED AND ADJUDGED, this the 4th day of March, 1997.

S/Sarah P. Springer
CHANCELLOR
nunc pro tunc

IN THE CHANCERY COURT OF LAUDERDALE COUNTY

THE STATE OF MISSISSIPPI

LINDA M. HOSEY — PLAINTIFF/ COUNTER DEFENDANT

VS. — CIVIL ACTION No. 89-0242-S

EARL E. HOSEY, JR. — DEFENDANT/ COUNTER/PLAINTIFF

STEVEN HOSEY — INTERVENOR

JUDGMENT DISMISSING COUNTER-CLAIM

THIS CASE having come before the Court on the Motions of the Plaintiff, Linda Hosey, to Dismiss the Counter-claim filed against her herein by the Defendant, Earl E. Hosey, Jr., and the Court having heard and received the evidence and testimony thereon, and having taken the issues under advisement, and having rendered its opinion sustaining Plaintiff's said Motions:

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Counter-claim and Amendments thereto filed herein by Earl E. Hosey, Jr., be and same are hereby dismissed with **prejudice** at Defendant's cost, and the "Opinion and Judgment" of the Court, dated January 17, 1997, is incorporated herein.

SO ORDERED AND ADJUDGED this the 12th day of February, 1997.

S/ Sarah P. Springer
CHANCELLOR

PREPARED BY:
S/ Dannye L. Hunter
Defendant's Attorney at law

S/ Daniel Self
Plaintiff's Attorney

S/R. L. Williams
Intervenor's Attorney

IN THE CHANCERY COURT OF LAUDERDALE COUNTY

THE STATE OF MISSISSIPPI

LINDA M. HOSEY PLAINTIFF

VS. CIVIL ACTION No. 89-0242-S

EARL E. HOSEY, JR. DEFENDANT

(Heard before Honorable Sarah P. Springer on the 16th of April 1997.)

Opinion and Judgment

This civil action came on for hearing on Motion on Review for Specific Relief as filed by the Plaintiff, Linda M. Hosey, against her fon-ner husband, Earl E. Hosey, Jr. The parties were divorced by Judgment of Divorce which was entered in this civil action on February 24, 1993. The evidence before the court is that the same parties were the parties in a separate maintenance action in this court, Civil Action File No. F-2140, in which a judgment was entered on January 18, 1984, and that child support, medical payments and separate maintenance payments accrued and were unpaid due to the Defendant's willful, wrongful, and contumacious disregard for the judgments of this court over many years.His disobedience to this court's orders continued after the divorce judgment referenced above, and Earl remained out of this court's jurisdiction until he was apprehended by Federal authorities in April, 1996. Since that time, this court has conducted numerous hearings in

regard to the validity and enforcement of this court's judgments, and found them to be valid and enforceable. The court likewise has previously considered all of the affirmative matters and defenses raised by Earl and has found them to be without merit.

Exhibit 97 is a recapitulation of all of the sums owed to Linda by Earl by virtue of the various judgments of contempt entered by this court, with interest at the rate of 8% per annum calculated, and with credit given for amounts paid. The total amount of unpaid alimony is in the sum of $435,364.02, including amounts previously reduced to judgment and amounts accrued since the judgment of divorce was entered. Linda is entitled to interest on that amount in the sum of $31,926.69, making the total amount of unpaid alimony and interest $467,290.71. Linda Hosey is granted a judgment against Earl Hosey in the sum of $467,290.7 1; interest at the rate of 8% per annum shall accrue on the unpaid balance of said judgment from and after this date, for which let garnishment, execution and all other appropriate process issue. This judgment shall constitute a lien against all of Earl's property, real- personal, or mixed, and shall be a lien against his estate. This judgment is intended to incorporate all previous judgments and to replace and update said previous judgments.

The total amount of the previous child support judgment which remains unpaid is in the sum of $46,991.21. On this sum, Linda is entitled to interest in the sum of $3,393.10.

The previous child support judgment is renewed and incorporated into this judgment in the total amount of $50,384.51; interest shall accrue on this judgment at 8% per annum. This judgment is intended to incorporate all

previous judgments and to replace and update said previous judgments.

Earl's failure to pay the child support and alimony as outlined above does constitute contempt of court. This court has previously ordered that Earl should be incarcerated on its finding of contempt and remain incarcerated until such time as all sums due and owing are paid in fall. Obviously, Earl cannot pay on the judgments and cannot pay currently accruing alimony payments unless he is out of jail and gainfully employed. The court will continue to suspend Earl's incarceration on the condition that he complies with each and every requirement of this judgment.

The annual interest on the child support arrearage judgment amounts to $41030.75; $335.90 per month. In order to retire this judgment, Earl will need to make monthly payments in excess of $335.90. Linda has requested that Earl be required to pay $900.00 per month on the child support arrearage in addition to the $600.00 continuing alimony obligation, for a total of $1,500-00 per month.

Exhibit 9 is Earl's most current income and expense statement. He lists gross monthly wages of $6,230.00. With deductions for Federal income tax, social security, insurance, and retirement, his net available income is $4,715.00. Should the court require $900.00 payments on the child support arrearage in addition to his $600.00 current alimony obligation, Earl will have remaining $3,215.00 per month to meet his living expenses. Under the circumstances, Linda's request is reasonable and should be, and is hereby, granted.

Commencing with the payment due May 1, 1997, Earl shall pay the sum of $900. 00 per month on his child support arrearage and interest until said judgment is paid in

full. Linda shall have the option to continue the child support bank payment plan mechanism for the payment of the child support judgment in the sum of $900.00 per month until the arrearage and all accumulated interest is paid in full, or she may opt for a valid wage withholding order to be served on Earl's employer for the collection of the child support arrearage. She shall exercise her option by presenting to the court a revised child support order or an immediately effective wage withholding order no later than April 30, 1997. Should she elect wage withholding, the bank plan method shall be continued through the month of May, 1997, with Earl to pay the sum of $900.00 to the Bank Plan, $450 on the I st and $450 on the 15th of May, plus the appropriate administrative fee of $2.00 per payment. The wage withholding order would be in effect then for the payments commencing June, 1997.

The court previously required that Earl pay his currently accruing alimony obligation of $600.00 and his monthly payment on his child support arrearage in the sum of $400.00 through the Bank Payment Plan. This plan is intended for the collection of child support and implements contempt proceedings initiated by the Guardian ad Litem for child support appointed by this court. Due to the fact that the majority of the money owed by Earl is alimony, it is inappropriate to utilize the bank payment plan for the retirement of the alimony judgment and collection of currently accruing alimony.

As a condition for the continued suspension of the incarceration provisions of this judgment, Earl shall pay his currently accruing alimony obligation directly to Linda, commencing with the month of May, 1997, in two equal payments of $300.00 each, due on the Ist and 15th of each month, with the first such alimony payment to be made on the Ist day of May, 1997 in the sum of $300.00, then

$300.00 on the 15th day of May 1997, and continuing on the I st and 15th of each month thereafter until the death of Linda or her remarriage, Earl's death, or until further order of this court.

The total amount that Earl Hosey owes on the alimony judgment with accumulated interest is $467,290.71. At 8% interest per annum, Earl will have to pay $37,383.26 annually, or $3,115.27 per month to service the interest on the debt. As noted previously, after payment of $1,500.00 per month for current alimony and payments on child support arrearage, Earl will have $3,215.00 available to meet his current living expenses.

It is reasonable to believe that Earl will never pay off his indebtedness to Linda in his lifetime. Linda has requested that Earl be required to irrevocably assign, set over and transfer to Linda $300,000.00 of his life insurance currently in force on his life through his employer, Unocal, and name Linda as his primary beneficiary. Exhibit 95 is the beneficiary designation executed by Earl on 3/30/94 which coincided with his marriage to his present wife, Laura. The exhibit also sets out the amounts of life insurance, accidental death and dismemberment insurance. Earl has in effect basic life insurance of $75,000; occupational accidental death insurance of $250,000; supplemental life insurance of $374,000; accidental death and dismemberment insurance of $75,000; and voluntary accidental death and dismemberment insurance of $200,000.00.

As beneficiaries of his basic life insurance plan, supplemental life insurance, voluntary AD&D, and his retirement plan, Earl has designated equal beneficiaries: wife, Laura; son, Steven, and daughter, Kim. As beneficiary of his Profit Sharing Plan, he designates his wife Laura, and alternate beneficiaries Steven and Kim. The

Spouse of the employee must be the beneficiary of the profit sharing plan unless she sips the change of beneficiary to a different person. There is no such limitation indicated on the beneficiary form with regard to the life insurance and AD&D insurance. In view of the fact that it is unlikely that Earl will be able to pay off his indebtedness to Linda in his lifetime, her request is reasonable and necessary and therefore, Earl should be and is hereby required to irrevocably assign, set over and transfer $300,000.00 of the life insurance and AD&D insurance in effect on his life through his employer and to designate Linda as his primary beneficiary. This requirement shall remain in full force and effect until such time as the judgments are reduced to less than $300,000.00, at which time the requirement of assignment will be only to the extent of the balance remaining unpaid.

Shortly prior to Earl's arrest for non-payment of child support by federal authorities, he transferred title to the home that he owned jointly with his wife Laura to Laura Hosey, individually. Earl testified that he transferred the property after suffering a heart attack and that was his motivation in making the transfer. It is obvious to the court that the transfer was made in anticipation of Linda's actions to collect his unpaid alimony and child support, and the transaction was done in an attempt to defeat her efforts at collection. There also was no consideration paid by Laura for the transfer of the marital home to her name alone. Earl continues to reside in that home and makes the monthly payment on the home. The court finds that the conveyance of said real property by Earl to Laura was made to hinder and defraud Linda in her attempts to collect the sums lawfully due to her from Earl, and as such said conveyance should be and is hereby set aside, and Linda is granted a lien against said real property to secure

the collection of the judgments granted by this court. See Blount v. Blount, 231 Miss. 398, 95 So. 2d 545 (1957). A copy of said deed is attached to this judgment as Exhibit A and is incorporated herein by reference in full.

While the proceedings in this court were pending (late 1996) Earl and his wife Laura refinanced the indebtedness on their jointly owned home. There was approximately $47,000 owing on the house, and Earl and Linda refinanced the house for $75,000.00. Earl and Linda used up equity in the house which could have been used in partial satisfaction of this court's judgments. This action on Earl's part was a further attempt on his part to avoid Linda's collection efforts. Earl pays a note of $782.00 per month on the house and also pays $234.00 per month by payroll deduction to repay a loan he took out against his 40 1 (k) retirement account for home improvements.

The balance on the 401(k) loan was $5,843.87 as of the December 31, 1996 statement from Unocal, Exhibit 89, and monthly payments of $234.00 are payroll deducted, thereby replenishing the vested balance. Earl in effect borrowed his own money. The total vested balance in this retirement account is $42,599.04 as of the date of the statement. This balance is reduced by the amount of the loan, making the balance $36,755.17 as of December 31, 1997. According to Earl, he may have only one loan outstanding on this retirement account at any one time.

Earl was born October 23, 1946, which makes him 50 years of age at his last birthday. Withdrawals from his 401 (k) account cannot be made without penalties prior to his reaching retirement age. He continues to contribute 1% of his gross income per month to the fund, and his contribution is matched by his employer. The money is invested in Unocal common stock and George Putnum

Fund of Boston, and the value of the account varies with the stock price.

This retirement account was accumulated during the time that Earl was disregarding the orders of this court and failing to pay child support and alimony as required by this court. It is inequitable for him to have the benefit of the assets he accumulated while Linda was doing without the support she was due. He attempted to avoid collection by putting his home in Laura's name; he has taken the equity accumulated out of the home and utilized it for his own purposes; he has purchased a Crown Victoria automobile for his wife, put the vehicle in his wife's name, and pays $500.00 per month on that vehicle. His actions over the years have been calculated to avoid Linda's ever receiving the money due her from this court's judgments. The amount Earl owes Linda is so large it is unlikely that the sums will ever be paid in full. Equity demands that these retirement funds be awarded to Linda.

Earl shall immediately make inquiry as to the amount that is available for him to withdraw from this 401 (k) account. His employer will most likely withhold the applicable taxes and penalty, and there will be a net amount available for Earl to pay on the alimony judgment. Earl shall file a report of this information as soon as it is available, but in any event, no later than thirty days from the entry of this judgment. As soon as he receives the net proceeds of this account, he shall tender said proceeds to Linda and shall file a report of said payment in this court file. Said amount will be credited against the alimony judgment. The court is aware that Earl will be able to deduct on his income taxes the amount that he pays to Linda as alimony, and this will offset the adverse tax consequences of withdrawal from his 401 (k) account.

Earl also has a pension plan through his previous employer, Schlumberger International. Exhibit 93 is the statement from that retirement account which shows the balance as of 31 December 1995 in the sum of $7,503.50. This account was likewise accumulated during the time that Earl was attempting to avoid his obligations under this court's judgments, and it is inequitable for him to have the benefit of this money. Therefore, Earl shall undertake the same steps as outlined above on the Schlumberger account. That is, he shall make inquiry, file report within 30 days, receive net proceeds, tender said amount to Linda, and file a report with the court.

Linda has requested that Earl be required to fumish her with a copy of the title to the Crown Victoria automobile for which he is paying but which is titled in Laura Hosey's name. Earl shall fumish Linda with a copy of said title, within 30 days of the entry of this judgment.

Linda has also requested that Earl be required to pay to her any bond refund to be received by him when the federal criminal case against him is concluded. Exhibit 96 is a copy of this court's judgment rendered July 22, 1996 in which this court did require that the bond not be given to Mr. Hosey without this court first being notified so that the bond would be available for attachment by Linda. On the same day, July 22, 1996, Earl signed an assignment of said bond in favor of his former attorney, Joe M. Hollomon. The court did require that Mr. Self call Mr. Hollomon about this matter, and Mr. Self reported to the court that the Bond Assignment had not been recorded in the Federal Court, and in fact had been signed by Mr. Hosey the Sunday before July 22, 1996 and that the document had been dated July 22, 1996 although not signed that day.

At such time as the federal criminal matter has been completed and the bond released to Mr. Hosey, said bond shall be paid over in full to Linda and applied to the alimony arrearage judgment.

Linda has asked that she be awarded a judgment for her reasonable attorney fees incurred in connection with her defense of the counter motion filed by Earl. The defense of the counter motion was rather involved, and the court found that all issues raised by Earl were without merit and dismissed them. The defenses raised by Earl included matters that were adjudicated years before and which could have been litigated when he was present through counsel before this court for the divorce action. The court's findings on the merits of those matters raised are contained in this court's judgment of January 17, 1997. Linda's attorneys reserved their request for attorneys fees to the final hearing of this civil action. They did not seek attorneys' fees for the motion now under consideration. Considering Rule I I and the Mississippi Litigation Responsibility Act, the court finds that Linda should be awarded her reasonable attorney fees incurred in the defense of this counter motion. Linda is granted ajudgment against Earl for her reasonable attorney fees in the sum of $6,088.95, for which let garnishment, execution and all other appropriate process issue. This judgment shall constitute a lien against all of Earl's property, real, personal, or mixed, and shall be a lien against his estate. Interest shall accrue on this judgment at the rateof 8%per annum.

To secure any unpaid balance on the outstanding judgments awarded in this Opinion and Judgment, Linda Hosey is granted a lien on the estate of Earl E. Hosey, Jr., including but not limited to, all personal accounts held by Earl in his name, all real and personal property belonging

to Earl or in which Earl has an interest, and all accounts of every kind and nature held by his employer or other persons or entities.

Earl testified that he has not yet filed his 1996 tax return, but expects to do so by August 15, 1997. He will have deductions for alimony payments and medical expenses, and may be entitled to a refund. Due to his continuing obligation to pay alimony, the likelihood that he will have tax refunds in the future, and Linda's continuing interest in Earl's financial status due to the judgments she has against him, it is reasonable to require that Earl provide to Linda copies of his tax returns each year. Beginning with his 1996 return, Earl shall mail to Linda a complete copy of his tax return, placing said copy in the mail at the same time as he mails the originals to the appropriate taxing authority. Should Earl be entitled to a tax refund for the year 1996 and any future year for so long as he remains indebted to Linda, he shall assign 100% of said tax refund to Linda by endorsing any such refund checks in her favor and forwarding said endorsed checks to Linda at her then current address.

At present, Laura Hosey is not employed outside the home and does not directly contribute to the expenses of the Hosey household with cash. Should she be employed outside the home and her income be reported on Earl's return, then Earl may file an appropriate motion with this court and the court will determine what portion of the refund, if any, is attributable to Laura and will enter an appropriate order.Earl is enjoined from cashing any income tax refund check he receives; he must either endorse it over to Linda or file an appropriate motion.

Earl will not be required to file a copy of his tax returns in the public court file; however, he shall file a certificate each year that he has complied with this court's

requirements with respect to the furnishing to Linda of a copy of his tax returns and a certificate that he has tendered to her his tax refunds, if any. Linda is specifically enjoined from utilizing the tax information and any other financial information provided to her by Earl pursuant to this order for any purpose other than to continue to monitor Earl's compliance with the requirements of this judgment and to enforce and collect the judgments awarded to her.

On May 1, 1997 and on the first day of May every year thereafter for so long as Earl remains indebted to Linda, he shall provide to Linda a complete Income and Expense statement, utilizing the form required by Uniform Chancery Court Rule 8.05. He shall file a certificate of compliance in the court file as required by said rule.

Earl Hosey and Linda Hosey shall each comply with the provisions of Uniform Chancery Court 8.06. Earl Hosey shall include in his requirement changes in employment status, changes of physical address, and changes in mailing address. Each party shall file a Rule 8.06 notice in this court file by April 30, 1997 and then update the notice as the circumstances warrant.

Due to the long history of this litigation and Earl's continued attempts to avoid the payment of the judgments of this court, it is reasonable to require Earl to periodically appear in person before this court to review his continued compliance with the requirements of this judgment and to review whether Earl's incarceration in the Lauderdale County Jail should continue to be suspended. Earl Hosey Jr. shall be and personally appear before this Court on September 29, 1997 at 9:00 a.m. for a review of his compliance.

This court specifically retains jurisdiction of this matter. All requirements and conditions placed on Earl Hosey are conditions of the continued suspension of his

incarceration in the Lauderdale County Jail, and the court will require strict compliance with all the requirements of this order.

This court will continue supervision of this case and will make such orders from time to time as are necessary and appropriate, considering the circumstances of the parties and the balances due on the judgments. All costs of court are assessed to Earl.

SO ORDERED AND ADJUDGED, this the 18th day of April, 1997.

S/ Sarah P. Springer
CHANCELLOR